United States Court of Appeals
FOR THE NINTH CIRCUIT

C. J. MONTAG & SONS, INC., et al, *Appellees-Appellants,* vs. INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al, *Appellants-Appellees.*	No. 18875
HOLMAN ERECTION COMPANY, INC., *Appellee,* vs. INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al, *Appellants.*	No. 18876
CURTIS CONSTRUCTION CO., a corporation, *Appellee,* vs. INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, et al, *Appellants.*	No. 18877

Appeal from the United States District Court for the Eastern District of Washington, Southern Division

HONORABLE WILLIAM J. LINDBERG, *Judge*

ANSWER AND REPLY OF APPELLANTS-APPELLEES TO MONTAG No. 18875, and REPLY TO HOLMAN No. 18876 and CURTIS No. 18877

R. MAX ETTER,
Suite 706 Spokane & Eastern Bldg.,
Spokane, Washington 99201
Attorney for Appellants.

KERSHAW'S, INC.

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ANSWERING BRIEF TO MONTAG

COMMENT ON APPELLEES' STATEMENT OF THE CASE

Appellant takes exception to part of the Statement of the Case set out in the Montag Brief at page 4 thereof, and reciting as follows:

> "In April, 1957, appellees assigned the work of rigging both the metal and wood forms on multi-purpose cranes to members of the Iron Workers Union Local 14 (see p. 57, par. 7). This assignment was made after an investigation disclosed that the *established practice in the locality* was to assign the rigging of all forms on multi-purpose cranes to members of the Iron Workers Union. (See p. 57, par. 8.)
>
> "Appellants objected to the assignment and contended that the work of rigging wood forms belonged to members of the Carpenters Union. (See p. 58, par. 9.) At no time was there an order of certification of the National Labor Relations Board determining the bargaining representative for employees performing rigging work at the Ice Harbor Dam project (See p. 57, par. 6)." (Emphasis supplied.)

It will be noted that the assignment by appellees was not made after "an investigation disclosed that the established practice in the locality . . ." but was made "as a result of written replies to inquiries addressed to contractors at other major dam projects in the *Pacific Northwest* . . ." (See Appellant's Opening Brief, Appendix p. 71, par. 8.) By exhibit 3 (Procedural Rules and Regulations of the National Joint Board) at page 4, par. (b), it is provided that the contractor shall assign disputed work in accordance with the established practice in the local area, and that the

local area for the purpose of determining the established practice shall be defined ordinarily to mean the geographical area of the local Building and Construction Trades Council in which the project is located.

Appellees were bound by the collective bargaining agreement (see exhibit No. 1) which provided that where there were conflicting jurisdictional claims the procedure of the National Joint Board for Settlement of Jurisdictional Disputes should govern. (See exhibit 1, p. 12, Sec. 2 et seq.) However, prior to the commencement of work, or the assignment of any work, appellees intended to avoid, and steadfastly refused to be bound by, the collective bargaining agreement or the procedure of the Joint Board. (See exhibit 4, Deposition of H. H. Brown, pp. 4-6, pp. 9-16; testimony of Guess p. 25, Appellant's Opening Brief, etc.)

SUMMARY OF ARGUMENT

1. The trial court's action in reducing appellee's damages by $40,000.00 is clearly supported by the evidence, and equity; the court's conclusion did not exceed its powers, which were properly exercised because Montag breached the collective bargaining agreement between Montag and Carpenters, appellants. The trial court should have awarded damages to Carpenters, appellants, but in any event its application of equity was justified.

2. Appellees are not entitled to recover the damages for claimed loss of equipment without deduction, nor should they be permitted under the facts to recover the rental value awarded.

3. Appellees were not entitled to recover any profit markup of 10%.

4. Appellees were not entitled to recover interest on the amount of damages.

ARGUMENT

I.

The trial court's action in reducing appellee's damages by $40,000.00 is clearly supported by the evidence, and equity; the court's conclusion did not exceed its powers, which were properly exercised because Montag breached the collective bargaining agreement between Montag and Carpenters, Appellants. The trial court should have awarded damages to Carpenters, appellants, but in any event its application of equity was justified.

This part of the brief will first answer appellee-appellant Montag's appeal. Montag will be referred to as appellees.

Appellant has discussed the first arguments made by appellees in their brief, at pages 48 to 51, of its Opening Brief. Appellees suggest that *Textile Workers of America v. Lincoln Mills,* 353 U.S. 448, does not impair *Westinghouse Salaried Employees v. Westinghouse Electric Corp.,* 348 U.S. 437, and that the court lacked jurisdiction to award the appellants damages, measured by wages claimed to be due individual employees of Local 1849. Appellees likewise claim that *Smith v. Evening News Assn.,* 371 U.S. 195 does not impair *Westinghouse,* supra, and that the holding in *Smith v. Evening News,* supra, is limited to the proposition that courts have jurisdiction under Section 301 only over actions by *individual employees.*

The appellant has the support of the study reflected in the *Proceedings of the Section of Labor Relations Law* of the American Bar Association, Part II, just published. Here we find in discussion of the minority committee report of the Special Warrior and Gulf Committee the following:

> "Finally in *Smith v. Evening News Assn.* 371 U.S. 195 (1962), the Supreme Court made clear that unions are free to bring suits, under Section 301, to enforce individual and group rights created by collective agreements. In so ruling, the court reversed its prior holding, in *Westinghouse Electric Corp. v. Westinghouse Salaried Union,* 348 U.S. 437 (1955), and effectively deprived proponents of the Warrior and Gulf rationale of a supporting argument in behalf of that rationale.
>
> "As long as *Westinghouse* remained the law, it was argued that the union's only alternative to arbitration was a strike, since the Westinghouse rule precluded union resort to the courts. And, of course, if a particular labor contract should contain a broad no-strike clause, there was just no alternative at all to arbitration.
>
> "But with the reversal of *Westinghouse* by *Evening News,* that argument has completely disappeared. Now, a union has the same right as a party to a commercial contract to: (1) arbitrate matters which the contract makes arbitrable, and (2) sue directly on matters which are not arbitrable under the contract" (Page 224).

Appellees' whole argument directed to the proposition that they did not breach the collective bargaining agreement is the same argument repeatedly made to the trial court. In essence, the appellees say they do not accept the award of the National Joint Board for which they bargained. (See Exhibit 1, p. 12, sec. 2 et

seq.) The National Joint Board, acting as the arbitrator, determined the matter submitted to arbitration. Appellees refused to accept the award. The same publication to which reference has just been made, that is, the ABA publication of its *Section on Labor Relations Law,* clearly indicates that appellees were in breach of their agreement. (See p. 196, et seq. of *Section of Labor Relations Law.*) Consideration of this material makes it quite plain that the conclusion of the report on the so-called Warrior and Gulf Triology (*United Steel Workers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574; *United Steel Workers v. American Manufacturing Co.,* 363 U.S. 564; *United Steel Workers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593) is correct:

> "In enforcing arbitral awards, the lower courts generally have been true to the Supreme Court's mandate that the merits of the decision not be reviewed. At least one court, however, has indicated that it would not enforce an award which was contrary to 'public policy,' and another appears to have reviewed the merits of an award under the guise of determining whether the arbitrator 'exceeded his authority.' In accordance with *Enterprise Wheel,* an arbitrator's award thought by the court not to draw its 'essence' from the collective bargaining has been refused enforcement" (p. 206.)

It is clear that none of the exceptions listed lend any aid or comfort to appellees' position here.

We think it plain that the court properly mitigated the damages of appellees. (See Opening Brief of Appellants, Carpenters, p. 30, p. 50.)

Another Appellate Court decision supporting the

District Court in this case is *Local* 127, *United Shoe Workers v. Brooks Manufacturing Co., et al,* 298 F. 2d 277, where the court makes plain its broad scope of authority in fashioning the federal remedy indicated by *Textile Workers v. Lincoln Mills,* 353 U.S. 448.

This court in *International Longshoremen's etc. v. Juneau Spruce Corp.,* 189 F. 2d 177, implies the power to mitigate damages where they are the creation of a litigant's "uncompromising attitude."

> "Appellants requested the court to give certain instructions which would have set out the policy of the Labor-Management Relations Act in respect to some of the labor disputes. These, appellants assert, would allow the jury to consider appellees' 'uncompromising attitude' in regard to negotiating a settlement, this as a defense by appellants or in mitigation of damages. This condition assumes that appellee had a duty to bargain with appellants in an effort to reach a settlement. Such is not the case. Appellee, who had a contract with the International Woodworkers of America covering the same work, was under no duty to bargain with appellant with respect to such work nor bow to appellant's demands in order to minimize its damages" (P. 191).

Obviously the ingredients of "uncompromising attitude" were apparent in abundance, in appellees' refusal, at any time, to accept the decision of the National Joint Board which, after full hearing, made its award. If appellees can effectively renounce an award which they do not like, then such actions, if permitted, will stultify the full Congressional policy, and will permit at will, the deliberate violation of contracts by

parties who can rely upon the sterility of the law to fail to fashion a remedy which will enforce their obligations.

II.

Appellees are not entitled to recover the damages for claimed loss of equipment without deduction, nor should they be permitted under the facts to recover the rental value awarded.

To proceed further than our argument in our Opening Brief would be repetitious, and we therefore refer the court to our Opening Brief, pp. 54-56, to exhibit 74 at pp. 16 and 17 of the exhibit, and to further argument.

III.

Appellees were not entitled to recover any profit markup of 10%.

We direct our attention to the profit markup. The extent of any testimony supporting a claim for a ten percent profit markup is found in the statement of Mr. Burton M. Smith, CPA (exhibit 68, p. 7) where he states: "This is an arithmetical computation which is accurate." There is no other testimony of any substantive character in appellees' case than Mr. Smith's that supports any claim for reasonable profit markup. The evidence here falls far short of reaching the stature of evidence which the Supreme Court of Washington considered lacking in *National School Studios, Inc., appellant, v. Superior School Photo Services, Inc., et al, respondents,* 40 Wn. 2d 263; 242 P. 2d 756. In the Washington case at page 274, we find the following:

"In proof of the amount of damages sustained by it, appellant offered the deposition of its president taken on written interrogatories. Upon his direct examination, this officer testified:

" 'Q. Was there any profit to the plaintiff from the business obtained by the defendant, Victor G. Lien, for the plaintiff during the years 1949-50? A. Yes. Q. If you answer that there did accrue to plaintiff profit from such business so obtained how much did such profit amount to? A. $4,957.41. Q. If you answer that there did accrue to plaintiff such profit, how do you arrive at the amount of profit so accruing to plaintiff? A. We made 10% of the dollar volume.'

"When the deposition was read at the trial, respondent Lien moved to strike the last answer quoted above on the ground that it was only the witness' conclusion unsupported by any factual proof.

"After counsel had argued the matter, the trial court denied the motion to strike without prejudice to respondents' right to renew their motion later in the trial. The court indicated considerable doubt regarding its ruling, stating in part:

" 'My feeling about the matter is this: The net profit is the ultimate question in issue on this phase of the case, and the defendant, I think, is entitled to know how that profit is computed.'

"The same motion was made by respondents when the portion of the deposition was read relating the profit made by appellant in 1948-49 from business produced by respondent Lien. The president testified that its profit for that year from Lien's business amounted to $5,765.94 and, when asked how this figure was arrived at, again, stated: 'We made 10% of the dollar volume.' The trial court made the same ruling as before.

"Appellant produced no other evidence as to its loss of net profit except the testimony of its president above quoted.

"In its memorandum opinion filed subsequent to the close of the trial, the court stated on this point:

" 'Plaintiff is seeking both damages and an injunction. The plaintiff has shown a very substantial loss in gross revenues and customers. Plaintiff declined to show its costs, and has not proved any reliable basis for determining the amount of its loss, if any, in net profit. Consequently, plaintiff is not entitled to recover damages.'

"In our opinion, the trial court was correct in denying appellant judgment for damages because of the inadequacy of its proof. The burden was upon appellant to prove with reasonable certainty its loss of profits caused by respondents' acts. The bare, oral statement by appellant's president that it made ten percent profit on the dollar volume of the business obtained by Lien is a mere conclusion. It does not constitute the reasonable certainty of proof which is required under the circumstances shown to exist in this case.

"It is common knowledge that such a corporation as appellant (which was doing business in nearly every state in the Union) must keep detailed books of account from which its *net* income can be ascertained. It would have been a simple matter to have computed such income with respect to the portion of its business obtained by Lien. Appellant had no difficulty in ascertaining from its ledger sheets the gross dollar volume of business obtained by Lien for the two years prior to his leaving its employ.

"From the record before us, it appears that in 1950-1951 Superior had grossed $34,993.83 in business from schools which had been appellant's customers in either or both of the two preceding years. In the absence of reasonable certain proof as to what appellant's net profit would have been had it continued to enjoy this business, there is no competent evidence upon which a judgment

can be based. The burden was upon appellant to furnish such proof, and this it failed to do."

In *Flame Coal Co. v. United Mine Workers of America,* 303 F. 2d 39 (6 cir. 1962), the court had occasion to consider a claim for lost profits. In this case there was considerable testimony about the earnings of the plaintiff. There was evidence of losses by reason of the failure to fill orders for coal. There was further testimony of prices that would be involved. There was testimony concerning the plaintiff's earned net income and its taxable income for several years. An accountant who testified for the plaintiff had worked up a schedule which purported to compute the profits lost by the companies in the cancellation of orders. He based his calculations in part upon facts in evidence and in part upon his examination of books and records of the plaintiff company. Although the court was of the opinion that there was a sufficiency of plaintiff's proof to establish compensatory damages, it did not permit that allowance because of the admission of an exhibit without a basis or foundation for the calculations thereon. In this case there is no proof of any profit, and to permit an allowance of profit on the bare statement that 10% is "marked up" or is a reasonable "arithmetical computation" is handing the whole matter over to pure speculation and conjecture.

Appellees also seek a duplication of recovery, and urge the court to allow in some instances both expenditures and loss of profits. The Supreme Court of Washington denied such duplication of recovery in *Platts v.*

Arney, 50 Wn. 2d 42, 47 (1957), 309 P. 2d 372, where it said:

> "However, where the plaintiff sues for his loss of profit, he cannot recover in addition to this the expenditures which he would have had to make in any event to carry out his own promises under the contract. See annotation: 17 ALR 2d 1300, Sec. 6."

What the court said in the foregoing case makes good law here and it should be applied.

IV.

Appellees were not entitled to recover interest on the amount of damages.

Appellees claim that they are entitled to interest as a matter of right on the amount of the damages claimed, all of which could have been ascertained (ascertained by whom and how?) on January 1, 1959. The first answer to this contention of appellees is that no court in any 303 case, has allowed interest, so far as our examination of the cases discloses. The special statutory enactment of Congress does not provide for interest. And the court is aware of the fact that in view of the nature of this action and the conflicting testimony concerning damages, considered with the method of proof of appellees (almost exclusively composed of hypothesis and estimate), there could be no ascertainment of damages in the sense that the law requires. The ascertainment of damages is not determined by the fiat of appellees' claim.

Counsel cites *Grays Harbor County v. Bay City Lumber Co.* 47 Wn. 2d 879, 289 P. 2d 975, as authority

for their claim. The Washington case upon which reliance is placed involved an action of conversion, where the general rule permits award of interest. The claim that the case is authority for appellees' position here, is not borne out by the Washington cases, and their interpretation of Washington law is completely diluted and distinguished by *Lamb v. Railway Express Agency,* 51 Wn. 2d 616, 619, 320 P. 2d 644, where the court said:

> "Appellant assigns error to the allowance of interest from the date of the loss, on the ground that under Washington law an unliquidated claim does not bear interest. This assignment is well taken. *Grays Harbor County v. Bay City Lumber Co.;* 47 Wn. 2d 879, 289 P. 2d 975."

In *Meyer v. Stromm,* 37 Wn. 2d 818, 829, 226 P. 2d 218, the court held:

> "Interest was disallowed by the trial court on the ground that Meyer's claim was unliquidated. The principle is well established that where a claim is unliquidated interest thereon is not allowed. *Brewster v. State,* 170 Wn. 422, 16 P. 813; *Fiorito v. Goerig,* 27 Wn. 2d 615, 179 P. 2d 316; *State v. Northwest Magnesite Co.,* 28 Wn. 2d 1, 182 P. 2d 643.
>
> "Meyer contends that Stromm's cross-complaint relative to the Karr well involved a separate transaction, and that Stromm admitted that $1,704.81 of Meyer's claim (on which Stromm had paid $1,273.25) was well founded. He reasons that the balance due on this $1,704.81 is therefore a liquidated claim, on which he is entitled to interest at the rate of 6% per annum from the date it became due. As so computed, Meyer's interest item is $74.90.

> "Meyer's argument overlooks the fact that the amounts which he alleged Stromm owed under the lease were not merely what Stromm admitted ($1,704.81), but an amount in addition thereto. Hence, Meyer's total claim was unliquidated, even though Stromm conceded that this much of it was proper. The matters of the rent for drilling the Erickson well, the casing used in that well, and the hourly rental rate were all in dispute, in addition to Stromm's counterclaim involving the Karr well. Where the demand is for something which cannot be established without evidence regarding the quantity or amount of the thing furnished, interest will not be allowed prior to judgment. *Wright v. Tacoma,* 87 Wn. 334, 151 Pac. 837."

In *Jellum v. Grays Harbor Fuel Company,* 160 Wn. 585, 593, 295, Pac. 939, the Washington court held that the claim involved, being an unliquidated claim allowance of interest, was improper.

In *Woodridge v. Johnson,* 187 Wn. 191, 194, 59 P. 2d 1135, the Washington court makes clear that under Washington law the present claim is not entitled to interest:

> "The general rule is that interest will not be allowed upon unliquidated demands prior to the time when such demands are merged in the judgment, but to this rule there are certain exceptions, one of which is that interest will be allowed upon unliquidated demands when the amount thereof can be ascertained by mere computation. Where the demand is for something which requires evidence to establish the quantity, or the amount of the thing furnished, or the value of the services rendered, interest will not be allowed prior to judgment."

Also see: *Phifer v. Franklin J. Burton,* et al, 141 Wn. 166, 251 Pac. 127; and *Powelson, respondent, v. City*

of Seattle, appellant, 87 Wn. 616, 36 ALR 2d 475, 36 ALR 2d 489.

REPLY BRIEF TO MONTAG, HOLMAN and CURTIS

SUMMARY OF ARGUMENT

1. Appellants' conduct did not violate Section 303(a) (4), Labor-Management Relations Act, 1947, and its conduct did not give rise to an action or cause of action under Section 303(b) thereof.

2. The appellant International Union, did not participate in and encourage the action of Local 1849.

ARGUMENT

I.

Appellants' conduct did not violate Section 303(a) (4), Labor-Management Relations Act, 1947, and its conduct did not give rise to an action or cause of action under Section 303(b) thereof.

Stuart Chase has written that "words are slippery in any language." Aristotle and the Aristotelian philosophers probably had the words or idea in mind when they developed a syllogism which they hoped would demonstrate truth. The writer of this brief has long been persuaded that Mr. Chase's words aptly describe the problems posed by the statutory provisions involved; that Aristotle et al could never come up with a major, minor, and ergo; and that one highly versed in semantics might be more helpful to the learned law fraternity in deciphering and reconciling the posi-

tives and the negatives when elements of 10(K) and N.L.R.B. are added to 303 with its A's and B's. However, faced with the problem, but absent the assistance, we suggest a determination in the instant case.

We cannot find that a court has had to cope with the precise situation developed in this case.

Surely a jurisdictional dispute as defined in Section 303(a) (4) is no more or less a jurisdictional dispute, whether the court attempt to define it in a 303(b) action, or in a proceeding before it involving its interpretation in a 10(K) proceeding. *International Longshoremen's, etc. v. Juneau Spruce,* 189 F. 2d 177, and 342 U.S. 237, provides no absolute guides other than to tell us that the administrative action and procedure of the Board in a 10(K) hearing is not a prerequisite to a civil action in a 303(b) proceeding. Approval of *Juneau Spruce* in cases cited has dealt with the independent nature of the civil and Board proceedings.

If it be assumed that an appellate court, in review of a proceeding of the National Labor Relations Board which refused to intervene in a dispute and to hold a 10(K) hearing, reasoned that in accord with *Penello v. Sheet Metal Workers Local Union* No. 59, 195 F. Supp. 458, and *Highway Truck Drivers, etc. and Safeway Stores, Inc.,* 134 NLRB 130, 1961, p. 40 Appellant's Opening Brief, the Board was correct, could it or would it in a 303(b) proceeding hold that an action would lie? In aid of the proposition that this theoretical proposal is not fanciful, we refer to the language of

the Board in the *Highway Truck Drivers* case, supra, where it was stated:

> "Certainly it was not intended that every time an employer elected to reallocate work among his employees or supplant one group of employees with another, a 'jurisdictional dispute' exists within the meaning of the cited statutory provisions."

Appellee Montag has cited *Local* 978, *United Brotherhood of Carpenters and Joiners v. Markwell,* 305 F. 2d 38 (8 cir. 1962; p. 39 Montag Opening Brief). However, in *Markwell,* supra, we find the following:

> "It is our opinion that the provisions relating to jurisdictional strikes and other activities are designed to protect the primary employer as well as neutral employers from involvement in internal disputes between unions, not of his own making" (p. 46).

and

> "The record also establishes that plaintiffs took a 'neutral position' in respect to the union affiliation of their employees . . ." (p. 47).

And again in *McLeod v. N.Y. Paper Cutters, etc.* 220 F. Supp. 133, cited by Curtis in its Brief, we find

> "It was the intent of Congress to prevent the enlargement of labor disputes which occur when a neutral bystander is enmeshed in a controversy not his own" (p. 136).

Vincent v. Steamfitters Local etc. 288 F. 2d 276, (CCA 2, 1961, Curtis Brief, p. 3) appears to be of questionable value here in the light of the statement that:

> "Its clear purpose was to drive two non-union men off the job."

The Supreme Court, in *National Labor Relations Board v. Radio and Television Broadcast Engineers, etc.,* 364 U.S. 573, in considering the perils of the employer in jurisdictional strife, stated:

> "And the House Committee report on one of the proposals out of which these sections came, recognized the necessity of enacting legislation to protect employers from being 'the helpless victims of quarrels that do not concern them at all' " (p. 580, 581).

Judge Tuttle's observation in *NLRB v. Operating Engineers Local* 450, 275 F. 2d 408 (CA 5, 1960), is significant and material, despite the rejection by the Supreme Court of its conclusion, that the National Labor Relations Board was not required to make an affirmative award of disputed work.

> "We note that the Supreme Court in *International Longshoremen's and Warehousemen's Union v. Juneau Spruce Corp.* 342 U.S. 237, at 243 says:
>
> " 'Section 8(b) (4) (D) and Section 303(a) (4) are substantially identical in the conduct condemned. Section 8(b) (4) (D) gives rise to an administrative finding; Section 303(a) (4) to a judgment for damages.'
>
> "Yet the Supreme Court expressly in that case ruled that suit for damages for the very kind of strike as was charged here can be maintained without any section 10(k) hearing. This is strongly persuasive, we think, that the requirements of 10(k) are *purely procedural,* for it seems highly unlikely that Congress would enact a statute permitting an aggrieved person to sue for damages for a jurisdictional strike, with the quality of the strike finally and irrevocably fixed without any Board determination, and at the same time provide that the same strike would no longer

> be an unfair labor practice as a basis for seeking injunction if the Board, acting as arbitrator assigned the work to the striking union. Under such a construction the work would have been assigned by the Board to the striking union and no violation of 8(b) (4) (D) would exist, but the employer would still have his right to sue for damages because the strike would still be a violation of 303(a) (4). We conclude that Congress did not intend such an anomaly." (Emphasis supplied.)

In order to reach this conclusion the court felt it was forced to treat 10(k) as purely procedural. Otherwise Congress intended an anomaly. But, *NLRB v. Radio and Television Broadcast Engineers, etc.,* supra, makes it clear that 10(k) is not procedural, but substantive. That being so, we submit that to avoid the anomaly, a jurisdictional dispute cannot differ in essence or fact whether it be the subject of definition in a 10(k) or a 303 proceeding.

We submit that the gravaman of the problem here is the definition of "jurisdictional dispute" and that the definition in *Penello* of that term is as correctly applied here, as in an injunction proceeding. We lay aside any part of that opinion or discussion which is unrelated to the court's definition of "jurisdictional dispute" in the statutory scheme.

The appellees here have contended that any dispute with an employer's work assignment is a violation of the statute and gives rise to a 303(b) action. We submit that the claim is not well-founded. We repeat appellees' argument set out in the Opening Brief of appellant at page 53:

> "It appears from the testimony that whatever dispute may have existed between the unions was settled on July 17, 1957, by an agreement to give the rigging of wooden forms to the Carpenters union. (Mitchell deposition, exhibit 9, pp. 15, 30-31.) The agreement was reaffirmed on November 14, 1957. (Exhibit 9, p. 31.) The action taken by the Board on November 27, 1957, was pursuant to the request of both unions on November 18, 1957, that the contractors be compelled to put their agreement into effect. (Exhibit 9, pp. 28-29.)"

and

> "The procedure referred to is set forth in exhibits 2 and 3. Examination of these exhibits, as well as the language of the contract itself reveals that the Joint Board was authorized to decide only conflicting jurisdictional claims between unions. It was not authorized to settle disputes between a union or unions, on the one hand, and the employer, on the other. Since no dispute existed between the unions on November 27, 1957, the Board had no jurisdiction to act." (Plaintiffs' brief on remaining issues, pp. 31, 32.)

The record is clear that although the Iron Workers desired the work assigned to them, and hoped to keep the work assigned to them, they never at any time made threats to get it, nor did they submit any data supporting a claim prior to the controversy over the work, between Montag and Carpenter appellants. (See Opening Brief, Carpenters, p. 71 Appendix, paragraphs 8 and 9.) And the testimony of Guess, a representative of Montag (see p. 25, Carpenters, Appellant, Opening Brief) makes it clear that Montag never did comply, or intend to comply with the provisions of exhibits 1 and 2, i.e. the collective bargaining agreement, and the Procedural Rules and Regulations of the National Joint Board.

In that connection the activities and procedures of Montag raise considerable doubt as to whether or not Montag in June of 1957 was engaged in jurisdictional dispute, or even contended that they were. Exhibit 3, at page 5 in paragraph 5, provides in part that:

> "In the event that there is any stoppage of work, or cessation of operations, arising from a jurisdictional dispute following an assignment of work, the contractor is to notify immediately the Chairman of the Joint Board . . ."

This, of course, Montag did not do until September 5, 1957 (Exibit 9, Deposition of Mitchell, pp. 10 et seq), and it being conceded that the Union did not comply with areas of its responsibility as set out in exhibit 3, one can conclude that neither party seriously considered that the dispute was jurisdictional. Recitations of the agreed pretrial orders clearly indicate that this was a dispute between Montag and the appellants, Carpenters. And despite agreement of the Carpenters and Iron Workers, Montag refused to accede to any of their proposals. Montag, of course, was not *required* to accede to such requests, but nevertheless the ensuing dispute did not therefore become of jurisdictional character.

II.

The appellant International Union, did not participate in and encourage the actions of Local 1849.

It is conceded that International representatives were engaged in negotiations and discussions during the Ice Harbor difficulties. Does it follow that their activity can be characterized as participating and in-

ducing actions of Local 1849? It must be kept in mind that the International was and is a party bound to appropriate actions prescribed by exhibit 3, the *Procedural Rules and Regulations, etc.,* p. 5 et seq. An International union is bound, in accord with the regulations to use its offices when reports of strife are made to it. It cannot do the very things required of it, without "participating." This, it did, but to conclude that its actions constituted encouragement of the local is not borne out by the evidence.

The arguments of all appellees have been considered in respect to the damage items sought to be set aside by appellants, and appellants rest upon the argument heretofore made on these matters.

Respectfully submitted,
R. MAX ETTER,
Attorney for appellants.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. MAX ETTER